United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-6114

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRUBRAD COMPANY,

Appellant,

-against-

UNITED STATES POSTAL SERVICE,

Appellee.

APPELLANT'S BRIEF

B

P/S

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Order Appealed From

This is an appeal from an order and decision of Hon. Orrin Judd of the United States District Court for the Eastern District of New York entered November 6, 1975 (A-2 to 13). The decision has not yet been officially reported.

The Facts

The essential facts in this matter are not in dispute which is why, after joinder of issue, both sides moved for summary judgment (A-21; A-27).

In 1964, plaintiff and defendant's predecessors in interest[1] entered into a lease for a store at Avenue X in Brooklyn, New York. The lease ran for ten years, with four five-year renewals at the option of the post office (A-16). The initial rent was $6,120 per annum (A-19) with the renewal option rents being $5,700; $6,000; $6,300 and $6,600 respectively (A-18). The post office accepted this lease after considering the comparative rental

1. Plaintiff's predecessor was Brubrad Corporation. Defendant's predecessor was the United States of America

situations in the neighborhood (A-29 through 34).

The rental in the lease was set forth in terms of "$" or "dollars" (A-16, A-18). At the time the lease was entered into, dollars either were silver certificates or federal reserve notes readily turned into silver certificates. These silver certificates were readily redeemable for silver dollars at the treasury department (31 U.S.C. 405-a) at the rate of $1.2929 per ounce, and had been so redeemable for over thirty years. Since our currency has been officially bimetallic since early in this century (31 U.S.C. 311), our currency also was valued in terms of gold at $35.00 per ounce. However, since 1934, Americans had been prohibited to own gold, except for very limited industrial purposes.

In 1967, Congress adopted 31 U.S.C. 405a-3, outlawing silver certificates as of June, 1968. Between that time and 1975, there was neither free circulation of gold nor silver, although our currency always remained officially bi-metallic.

Beginning in 1971, the United States enacted several devaluations of the dollar. See, e.g., Public Law 92-268 and 93-10. Finally, in 1974, Congress enacted Public Law 93-373 which, as of January 1, 1975, allowed unlimited ownership of gold and silver, and for the value of the dollar in relation to both of these metals to be set by the free market. The effect of this procedure was to effectively drastically devalue the dollar, so that by 1975 it cost approximately $168[1] to buy an ounce of gold, rather than the $35 official value until 1971, and $4.20 to buy an ounce of silver, rather than the $1.29 it cost in 1964 and for many years thereafter, including the four year period thereafter when silver actually could be purchased from the treasury at that rate.

1. This sum has since declined to approximately $145

In 1974, the appellee exercised its first option to renew. At the beginning of 1975, appellant requested that appellee agree to an increase in its rent to compensate for the loss caused through the aforesaid devaluations. When this was refused, the within action was commenced.

The complaint seeks reformation of the lease so that the terms "$" and "dollars" be read as referring to dollars at the time the contract was negotiated and entered into, (A-15); at the hearing, the court agreed to give alternate consideration to the matter as a declaratory judgment as to whether the government could and did effectively unilaterally lower its rent by the aforesaid devaluations (A-5):

After joinder of issue, plaintiff moved for summary judgment as to liability and for the matter to be set down for assessment of damages (A-21); defendant cross-moved for summary judgment (A-27). The lower court granted defendant's motion (A-13) from which this appeal was duly taken.

<u>Questions Involved</u>

1. Did the appellee, by various acts of devaluation since 1971, effectively unilaterally reduce its obligation to appellant?
2. Could the appellee, by the aforesaid acts of devaluation, legally unilaterally reduce its obligation to appellant?
3. Has plaintiff set forth a basis for proving actual damage as a result of these devaluations?
4. Should the court have granted appellant's alternative request for reformation of the contract to set forth the full meaning the parties intended when they employed the terms "$" or "dollars"?

The Law

POINT ONE: BY ITS SUCCESSIVE DEVALUATIONS, APPELLEE HAS EFFECTIVELY UNILATERALLY REDUCED ITS PAYMENT TO APPELLANT

Paper money has no intrinsic value. Unless it is backed by some commodity or thing which the public agrees has such intrinsic value, it is worthless.

The two substances which most of the contemporary world agrees has a definite intrinsic value are gold and silver. Moreover, they best fulfill scarcity[1], durability, bulk and other requisites for a universally acceptable value base. All major currencies of the modern world are valued in terms of gold, and most are valued in terms of silver[2] and gold. 31 U.S.C. 311.

While gold and silver are the value bases for the contemporary world, as they have been for many centuries, as the capitalist economy developed, it became impossibly cumbersome to engage in major transactions in specie coin. Therefore, banks and governments began issuing paper currency representing a particular amount of specie. Of course, these institutions had to have sufficient specie in their possession to back their commitments. This evolution from specie to paper currency was one of the hallmarks in the development from mercantilism to capitalism. By the mid-nineteenth century, virtually all major currencies were at least in part paper.

1. Radium or platinum are too rare to allow for necessary distribution, while water or wheat are so common that enormous amounts would have to be stored to give currency sufficient backing. Moreover, radium and wheat are insufficiently durable. One problem with gold is that it is not uniformly distributed in nature and so a few countries benefit disproportionately from revaluations. For this reason, there is a search at present for some new underlying universally acceptable specie.
2. "Thou shall not crucify mankind on a cross of gold"was a cry for the bimetallism which we later adopted, not for unlimited paper.
3. Contrary to the opinion of the court below (A-10), 31 U.S.C. 463 in no way repeals 31 U. S.C. 311. One concerns the backing for our currency while the other concerns whether specie payment may be required In any event, as is discussed below, ¶463 does not apply to government obligations.

While governments may, for various reasons, restrict the holding of specie by their citizens, as we did with regard to gold from 1934 to 1975 (48 Stat. 1; 48 Stat. 337) or the exchangibility of currency for specie, as we did with regard to silver from 1968 through 1975 (31 U.S.C. 405a-3), they must always maintain sufficient specie reserve behind their paper currency. The maximum currency an issuing body can circulate is limited by this reserve. Where the issuer forgets this concept, or where severe conditions make proper backing impossible, the currency rapidly becomes valueless for without such backing the amount of currency issued is limited only by the speed at which the presses can be run. In this century, we have had such occurrances in the Weimar Republic, China and contemporary Argentina.

In this country, the body with the authority to issue currency also is the body to determine its value[1], i.e. to say how much gold or silver will back a given unit. From time to time, that body may decide that the currency should be revalued. The conditions underlying such determination may vary widely: the economic situations in the United States in 1934 and 1971 could not have been more different, yet in both instances, the government determined that currency devaluation was in order.

Any devaluation necessarily means an increase in the value of gold or silver which the issuing body retains to back the currency in terms of that currency, and contrawise a decrease in the value of the currency in terms of underlying specie. Since the United States (as well as all other modern countries) keeps its budget in terms of dollars rather than underlying specie, the increase in currency value of the specie is reflected in the budget as a receipt. 31 U.S.C. 449(b); 1973 Cong. News p. 2056.

1. While the Federal government has always set the standard of value of the dollar, in the nineteenth century most paper dollars were issued by private banks.

Of course, for every receipt or increase in assets by one party, there must be an expenditure or decrease in assets by another. The corresponding expenditure to the government's increase in assets that results from devaluation is by and large[1] incurred by those unwitting citizens such as plaintiff who have fixed-cost agreements with the government, for the following reason.

The dollar, of course, is both a domestic and international currency. However, the United States has no soverign power beyond its borders. Therefore, when we devalue our currency, we must appropriate additional funds in order that the true sum of our international commitments remain the same. For example, the 1971 devaluation "cost" the United States over two billion dollars in international payments. 2 Congressional News 1971, p. 2215. In reality, of course, there was no "cost" to us whatsoever: the additional payment was in depreciated dollars so that the net result in terms of specie was nil.

However, domestically, at least if it is not restrained by its Constitution or laws, a government can exercise its soverign powers and profit by devaluation. This is what the United States has attempted to do in the case at bar. It is the disputed contention of this case that such attempts are illegal and unconstitutional. However, there is no dispute that this is what has in fact occurred. Appellant entered into a lease with appellee at a rental of 510 dollar units per month which represented approximately 400 ounces of silver specie; in 1975, by the sole, willful action of appellee, these same dollar units represented approximately 100 ounces of silver. Gold was not available

1. To the extent that the corresponding inflation lags behind dollar devaluation, appellee also profits on short-term or cost-plus contracts. This, however, constitutes a short-range and relatively small profit.

in 1964, but because of 31 U.S.C. 821 theoretically declined on the same basis.

Devaluation is not merely a theoretic act: a dollar that can buy less silver or gold also can buy less heat, electric, janitorial services or electric bulbs. Where payment is in a currency which has suffered repeated devaluations, mortgage interest rates[1] will increase as banks must take into consideration that future payments may be in dollars worth far less than the sum loaned[2]. Taxes likewise will increase as the cost of various items required by the municipality will be higher in terms of dollars even as they remain the same in terms of real values. All of these increased costs have been incurred here.

There are a multitude of causes of inflation, many of which have little to do with the government, and for which the government has not and should not be held liable. Devaluation, however, is an inflationary action which moreover is the intentional and willful act of the government. The 1934 devaluation of our dollar was in large part intended to offset the huge depression in our currency which had occurred since 1929. Obviously, the purpose of recent devaluations has not been to stimulate inflation: rather, they were directed towards such matters as the international balance of payments and the high cost of mining specie relative to price. Nonetheless, one effect of devaluation has been to trigger what had been a relatively stable three-percent-per-year inflationary trend which had existed for the prior twenty-five years into a multidigital ascent.[3]

1. Mortgage principal payments also will increase as will the principal sum of the mortgage, but the real change will be nil since the payments will be in depreciated dollars.
2. Unless specified in the agreement, private contracts cannot be altered due to devaluation. See point two, infra.
3. Since 1970, the devaluation of the dollar has been far greater than the rise in the rate of inflation. This is why we are in a seemingly inflationary but actually deflationary period: all indices show prices and wages rising, but that is because they are shown in greatly deflated currency.

Whether or not as an overall policy matter[1] the recent devaluations have been wise is not for the Court to decide, and is a matter of much dispute. What is not subject to dispute, and what the court must consider, is that by these devaluations appellee has effectively reduced its rent so that the five hundred ten "dollars" which it agreed to pay and was paying in 1964 and for several years thereafter is now worth approximately the equivalent of five hundred ten 1964 quarters.[2] The fact that the United States continues to call its money "dollars" does not alter the fact that it is not in any substantive sense the same currency as existed in 1964.

POINT TWO: APPELLEE CANNOT, THROUGH DEVALUATION, UNILATERALLY REDUCE ITS OWN CONTRACTUAL OBLIGATIONS.

It has long been the law that, absent some specific provision therein, neither government nor private contracts are entitled to legal readjustment because of inflation. Columbus Ry v. City of Columbus, 249 U.S. 399, 39 S.Ct. 349 (1918). It also has long been the law that private contracts are not entitled to readjustment because of devaluations. Norman v. B. & O. Railroad Co., 294 U.S. 240 (1934). The reason behind these doctrine is that neither party to private contracts is in any way responsible for devaluation, and is necessarily subject to acts of the soverign which include revaluation of currencies; nor are governments responsible for inflation.[3] Entities should not be made to suffer for losses which they do not either intentionally or negligently cause.

Where, however, the soverign is a party to a contract and then attempts to revalue its obligation, the situation greatly differs. Jones v. Lynn, 477 F.2d 885, 895 (5th Cir. 1973); United Transport

1. Congress seemed principally concerned with international implications of devaluation rather than its effect upon domestic contracts. See, e.g., 2 Cong. News 1971, p. 2215; Cong. News 1973, p. 2053
2. Indeed, many shops are paying substantial premiums for pre-1967 coins: Sam Goodys in New York is buying earlier quarters for 75¢ each.
3. The extent of government intervention in the economy has greatly increased since 1918 and the government may at some point be held liable for losses on its contracts caused by inflation.

Service v. National Mediation Board, 179 F.2d 452 (D.C. Cir. 1949). The landmark case on this doctrine, and the one most relevant to the case at bar is Perry v. United States, 294 U.S. 330 (1934)

In the Perry case, the United States government had issued "gold" bonds prior to the enactment of various statutes which served to (a) devalue the dollar, (b) compel payment "dollar for dollar" on devalued obligations, and (c) prohibit payments in gold. When these bonds became due, Perry demanded payment either in gold coin at the rate in effect at the time the bondwas issued, or its equivalent in dollars. The Supreme Court, by an 8-1 margin, held that the government could not devalue the dollar and then compel payment "dollar for dollar" on its own obligations:

> We think that the reasonable import of the promise is that it was intended to assure one who lent his money to the Government and took its bond that he would not suffer loss through depreciation in the medium of payment. (pp.348-9)
>
> Punctilious fulfillment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933 great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would not be the practice of economy but an act of repudiation (at 352-3, quoting Sinking Fund Cases, 99 U.S.

The fact that the government's own obligation was involved is precisely what distinguished Perry (and precisely what distinguishes the case at bar) from the holding in the Norman case, supra, decided the same day, which held that private obligations could be varied through devaluation:

> The bond in suit differs from an obligation of private parties, or of States or municipalities, whose contracts are necessarily made in subjection to the dominant power of the Congress (at p. 348)
>
> There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers (pp. 350-51)

The reasoning behind this is that when the Federal government enters into contracts, its rights and obligations under those contracts become the same as those of private parties.

> Rights against the United States arising out of a contract with it are protected by the Fifth Amendment ....When the United States enters into contract relations, its rights and duties therein are governed by the law applicable to contracts between private individuals. Lynch v. U.S., 54 S.Ct. 840, 292 U.S. 571, 579 (1934).
>
> G.L.Christian Aid Assocs. v. U.S., 312 F.2d 418 (Ct.Cl. 1963)
>
> N.Y. Mail & News Transportation Co v. U.S., 154 F.Supp. 271, 276 (Ct. Cl. 1957)
>
> The Congress, in the exercise if its constitutional authority, has broader power in dealing with contracts of private persons than it has with respect to contracts of the soverign United States.
> Miller v. Howe Sound Mining Co., 77 F.Supp. 540, 551 (E.D.Wash.N.D. 1948)

If a private party agrees to deliver ten pounds of wheat when there are sixteen ounces to a pound for a given sum, it cannot thereafter declare that it will deliver ten pounds of wheat for the same sum at a rate of only eight ounces to the pound. That, however, is what the federal government was attempting to do in applying 31 U.S.C. 463 to its own obligations, and what the federal government is attempting to do in the case at bar when it is seeking to pay the same "dollar" rent in dollars which it has greatly devalued.

In the Perry case, the Supreme Court held 31 U.S.C. 463 unconstitutional insofar as it applies to government obligations:

> The question is necessarily presented whether the Joint Resolution of June 5, 1933 (48 Stat. 113) is a valid enactment so far as it applies to the obligations of the United States (at p. 349)
>
> We conclude that the Joint Resolution of June 5, 1933 insofar as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.

See also Note 1 to 31 U.S.Code Annotated 463 (West Pub. Co. 1954). It is respectfully submitted that the lower court fundamentally misread this aspect of Perry: Judge Judd said that since 31 U.S.C. 463 had been enacted many years prior to the lease between the parties, appellant should have been aware that the government could devalue the dollar and then make "dollar for dollar" payments (A-11). What was overlooked in that reasoning is that 31 U.S.C. 463 had been specifically held inapplicable to government obligations in Perry and therefore appellant had every right to assume that that statute was inapplicable to the lease it negotiated.[2]

Contrary to the holding of the lower court, Perry clearly stands for the doctrine that the United States cannot effectively reduce its own obligations by devaluing the dollar and then tendering "dollar for dollar" payment. This is what the United States has done[1] in the case at bar, and why appellant's summary judgment motion, not appellee's should have been granted.

POINT THREE: PLAINTIFF HAS SHOWN ITS BASIS FOR DAMAGES SUFFICIENT TO SUSTAIN A CAUSE OF ACTION

Perry is divided into two distinct aspects. In its first phase (pp.346-352), the Supreme Court held, 8-1, that Perry had set forth a valid complaint. In its second aspect (pp.352-358)

1. It was not the intent of Congress to devalue domestic obligations. The Congressional News chapters discussed earlier are directed towards the international effects of devaluation.
2. Avery, cited by the court below (A-11) involves a private contract.

the Court held that Perry failed to set forth a basis for actual damages necessary to sustain the cause of action. This distinction between having a legally cognizable complaint and the establishment of damages necessary for court jurisdiction is a crucial aspect of Perry. Jenkins v. U.S., 86 F.2d 123 (5th Cir. 1936); Coleman v. U.S., 18 F.Supp. 71 (W.D.Tenn. 1937). This distinction was overlooked by the court below. It is central to the within motion by appellant which was directed only to the cause of action, and not to the issue of damages uponwhich a further hearing was requested (A-21).

Nonetheless, while technically irrelevant to appellant's motion, there is no reason for a court to remand a matter for a hearing where the outcome of that hearing is certain. Thus, it is important to show that the reasons for denying damages are totally inapposite to the case at bar.

The principal reason why damages were denied in Perry and the case dismissed concerned impossibility of performance. Prior to its devaluation of the dollar, the Federal government had withdrawn gold coin from circulation and prohibited dealing in gold except in very limited circumstances (See Perry, pp.355-6). The Supreme Court held that even as against its own contracts, the government had the power to prevent specie circulation under its Constitutional right to coin money. Therefore, since Perry could not hold gold coin, the provisions requiring payment in gold coin had become impossible to perform, and the obligation of the government therefore could not legally be fulfilled. This was also the holding in the companion case of Nortz v. U.S., 294 U.S. 317 (1934).

All of this is irrelevant to the case at bar. Our contract has in no way become impossible to perform. Payment is called for in dollars, and dollars are what plaintiff is requesting. Moreover, even if it be argued that plaintiff is in effect requiring payment to be based on gold or silver, this still would set forth a basis for damages since due to PL 93-10, gold and silver have been freely circulating since January 1, 1975:

> This case is not the same as if gold coin had remained in circulation (Perry, p. 355)

Judge Stone, although he concurred with the ultimate result in Perry, dissented from the finding of the entire remainder of the Court on this point. When one recalls that Judge Stone was the only one of the judges to take this position, his following language makes clear that the Perry holding clearly gives the within appellant a valid cause of action:

> I am not persuaded that we should needlessly intimate any opinion which implies that the obligation may so operate, for example, as to interpose a serious obstacle to the adoption of measures for stabilization of the dollar, should Congress think it was to accomplish that purpose by resumption of gold payments in dollars of the present or any other gold content less than that specified in the gold clause, and by the re-establishment of a free market for gold and its free exportation. (pp. 359-360).

The second reason why damages were denied in Perry was that, due to the dpression which had occurred between the time of issuance of the bonds and the time redemption was demanded, the actual value of moneys paid, despite the devaluation of the dollar, was not less but rather was more than the value of the dollar at the time the bonds were purchased. Therefore, while there may have been a theoretic loss due to devaluation, given the economic circumstances of the time, there was actual gain, and thus no damages were sustained:

> The question of actual loss cannot fairly be determined without considering the economic situation at the time the Government offered to pay him.... (p.355)

> Plaintiff's damages could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred (p.357)
>
> Plaintiff seeks to make his case solely upon the theory that by reason of the change in the weight of the dollar he is entitled to one dollar and sixty-nine cents in the present currency for every dollar promised by the bond, regardless of any actual loss he has suffered with respect to any transaction in which his dollars may be used. We think that position is untenable. (p. 358)

In order to overcome the potential barrier to recovery under the Perry doctrine, and specifically the language:

> Plaintiff has not shown,or attempted to show, that in relation to buying power he has sustained any loss whatsoever (p.357)

appellant set forth evidence that the situation between 1964 and 1975 was completely opposite to that between 1930 and 1934 in that there now had been a serious decline in the buying power of the dollar. See charts appended hereto. The court below misinterpreted this portion of appellant's argument as a petition for contractual relief due to inflation which, as discussed earlier, cannot be granted. However, in illustrating the effects of inflation, appellant was not attempting to show the gravamen of its cause of action (point 1 of Perry) -- although that is how the court below misunderstood appellant's efforts -- but rather demonstrating the reasonable possibility of establishing actual damages at the hearing (Point 2 of Perry).

That inflation has occurred in this intervening period is a fact of which the Court may take judicial notice. Downs v. Baltimore & Ohio R.R., 345 Ill. App. 118, 134 (1952). See also monthly U.S. Department of Commerce, Survey of Current Business from 1964 to date. Thus, the within appellant has suffered a real, as well as a theoretic loss through the devaluation of the dollar, or at the very least has shown sufficient possibility of establishing this loss to remand the matter for a hearing as to damages.

POINT FOUR: APPELLANT SHOULD HAVE BEEN GRANTED ITS ALTERNATE REQUEST FOR REFORMATION

The initial cause of action sounds in reformation (A-15). At the hearing, the Court below quite properly allowed alternative consideration of declaratory relief (A-5). Points One through Three, supra, establish why the latter should have been granted. It is respectfully submitted that reformation also is proper as alternative relief.

Reformation is granted when there is a mutual mistake in a document so that it fails to express the intent of the parties.[1] The mistake may be either one of commission or omission. Corbin on Contracts, Sec. 614 (1 Volume Edition, 1952). The contract in issue says that rent is to be paid in "$" (A-18) or "dollars" (A-16). Nowhere in the contract are these terms defined. Obviously, these terms meant what they represented at the time the contract was negotiated and entered into. However, in order to keep the document of manageable length, only shorthand representation was used.

Certainly, the government was fully aware of Perry and so could not have expected the 31 U.S.C. 463 "dollar for dollar" exchange to apply to the case at bar. Certainly appellant would not agree to what is effectively a thirty-year lease at a specified number of "dollars" if it believed that the substantive meaning of "dollars" could be changed into pennies at the whim of one of the parties to the contract.

1. It might alternatively be argued that since neither party contemplated devaluation at the time of the contract, this is a subsequent event not within the contemplation of the parties which allows for reformation. Chicago, Minneapolis & St. Paul Ry. Co. v. Hoyt, 149 U.S. 1, 13 S.Ct.Rep. 779.

Therefore, appellant is entitled to reformation as well as to declaratory relief.

Conclusion

The court below was concerned that appellant would be unjustly enriched by a recovery in this action, since devaluation has made the dollar worth one-quarter of its 1964 sum while in terms of actual value the dollar is worth approximately one-half that sum (A-7). Actually, this question was not even before the Court, since appellant was not moving for any award of damages, but merely for a hearing at which damages would be determined (A-24). However, appellant submits that an award on the basis of devaluation would no more "unjustly enrich" it than the vagaries of inflation -- which all parties agree would not give rise, by itself, to any cause of action -- would "unjustly impoverish" it. The fact that the rate of inflation has not kept pace with the devaluation of the dollar is simply a benefit, not brought about by the act of either party, that would happen to accrue to appellant. Certainly appellee would not agrue that if the rate of inflation was greater than the rate of devaluation (as was the case until quite recently), appellant should be given damages based on the higher sum.

Moreover, as between the parties -- which is what matters when unjust enrichment is involved -- no enrichment, just or unjust, would exist. Appellant would be receiving in real terms precisely the sum for which it contracted. All that appellee would be doing would be returning to appellant that portion of 31 U.S.C. 449 "miscellaneous receipts" which it took as unilateral profits from the contract with appellant when it devalued the dollar. If there was any "unjust enrichment" involved, it was this unilateral credit to miscellaneous receipts, which would be corrected by such a measure of damages.

Alternatively, the Court may determine that the government's obligation should be determined by the actual state of the economy rather than the rate of dollar devaluation, relying on portions of the second part of Perry. It is respectfully submitted that such an approach would be considering inflation as a determinant in re-evaluating contracts in contradistinction to the Columbus Railway and related cases. Moreover, it would be extremely cumbersome as there would have to be continuous readjustments .

In any event, if this court remands the matter for a hearing on damages, it should set general guidelines -- i.e., whether these damages should be measured by the rate of devaluation or the rate of inflation -- for the court below to follow.

The lower court also seemed concerned about the enormous financial implications to the Government if the relief sought was granted (A-12), although not the slightest proof concerning these implications was before the Court. The real "cost"to the government can best be seen by the amount credited to miscellaneous receipts upon devaluation. When the dollar was devalued by ten percent, there was a credit of under one billion dollars. 2 Cong. News 1971 pp.2209 et seq. All the devaluations since 1971 have approximated seventy-five percent. Thus, their gross cost would be a maximum of seven billion dollars. While not a trivial sum, it amounts to well under three percent of the annual federal budget, and this is a cost which would be properly amortized over many years.

Of course, this "cost" really is not a "cost"at all. It simply is a removal from miscellaneous receipts of the sums placed there upon the various devaluations.

Morever, this sum is based on the assumption that every fixed-cost government contract would have to be readjusted by the full

amount of the devaluations. However, contracts entered into after 1970 would be readjusted by some lesser amount, and contracts intered into in 1975 or thereafter when the dollar by definition was a floating currency would not have to be readjusted at all. The court below, for example, talked about the implied readjustment of government bonds (A-12), and indeed some readjustment might be in order. However, what will matter with these bonds are not the dates of redemption but the dates of issue: the overwhelming majority of Federal borrowing is short-term and would not be affected at all.[1]

Moreover, many claims would be barred by statute of limitations. Finally, this Court may decide to grant prospective relief only.

While there therefore is some cost involved in granting relief to appellant, it is not great relative to total federal costs, and certainly not as serious as establishing the doctrine that the government may at its will or whim alter its contractual obligations. Dissenting language often becomes lost in the maze of legal history, and this has been particularly true of the "conservative" 5-4 minority of the 1930's Supreme Court. Nonetheless, with the rude reawakening we have had in recent times to the dangers of an unbridled, amoral federal behemoth, it might not be too difficult to agree with these dissenters when they say

> Loss of reputation for honorable dealing will bring us unending humiliation; the impending legal and moral chaos is impending (Perry, p. 380)

nor with Alexander Hamilton, who has well-established credentials as a revolutionary, when he said:

> It is in theory impossible to reconcile the idea of a promise which obliges with a power to make a law which can vary the effect of it (Perry, p. 380)

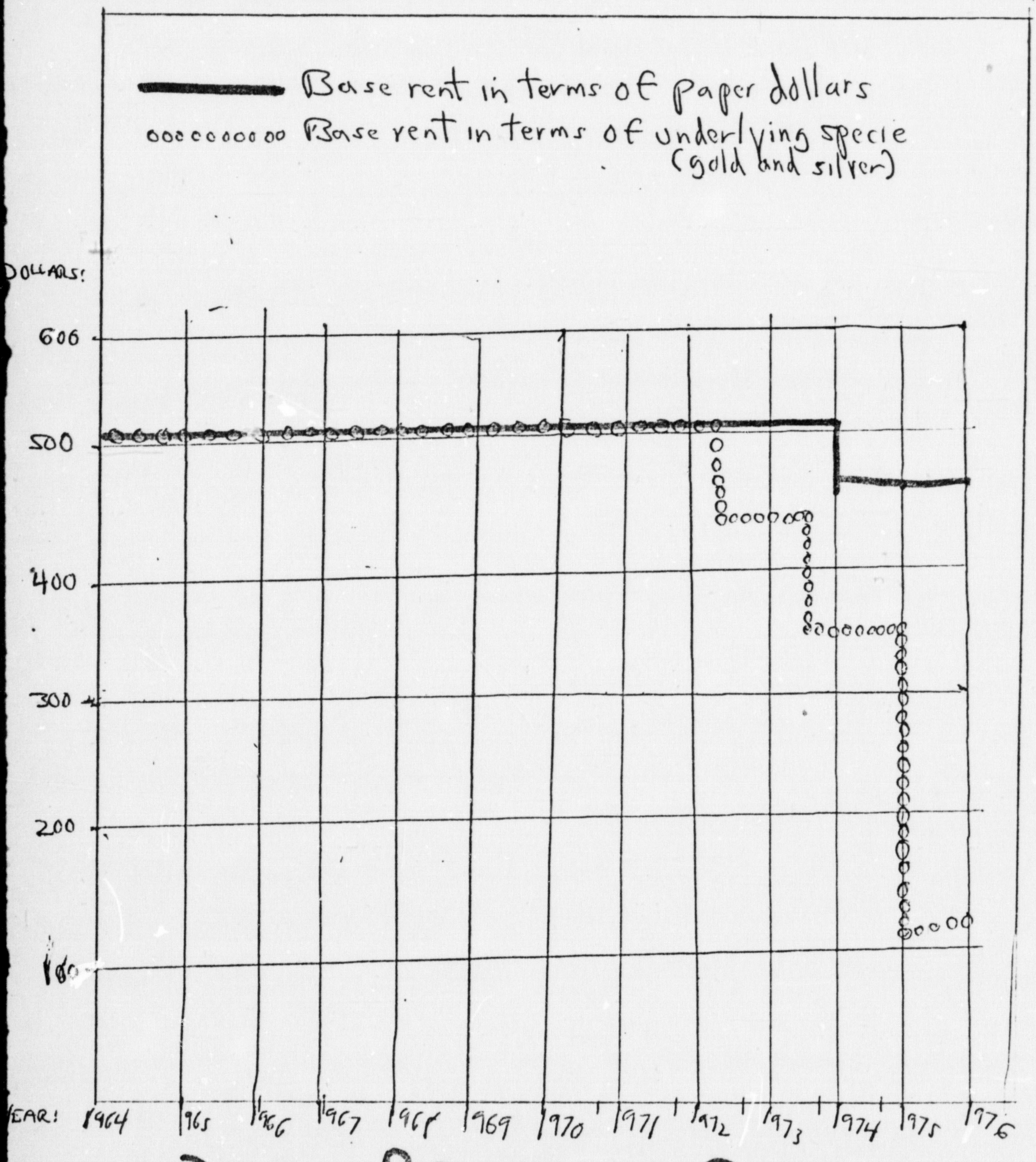
Opposition to arbitrary government was precisely what our revolution was about and why we have a written Constitution. If the

1. Nor would private contracts, or state or municipal contracts be in any way affected due to the companion Norman decision.

decision below is affirmed and this court holds that the government may alter the effective obligations of its own contracts by changing the value of the currency in which those obligations are to be paid, a very serious step towards precisely that form of arbitrary government against which our nation was formed and our Constitution written will have been taken.

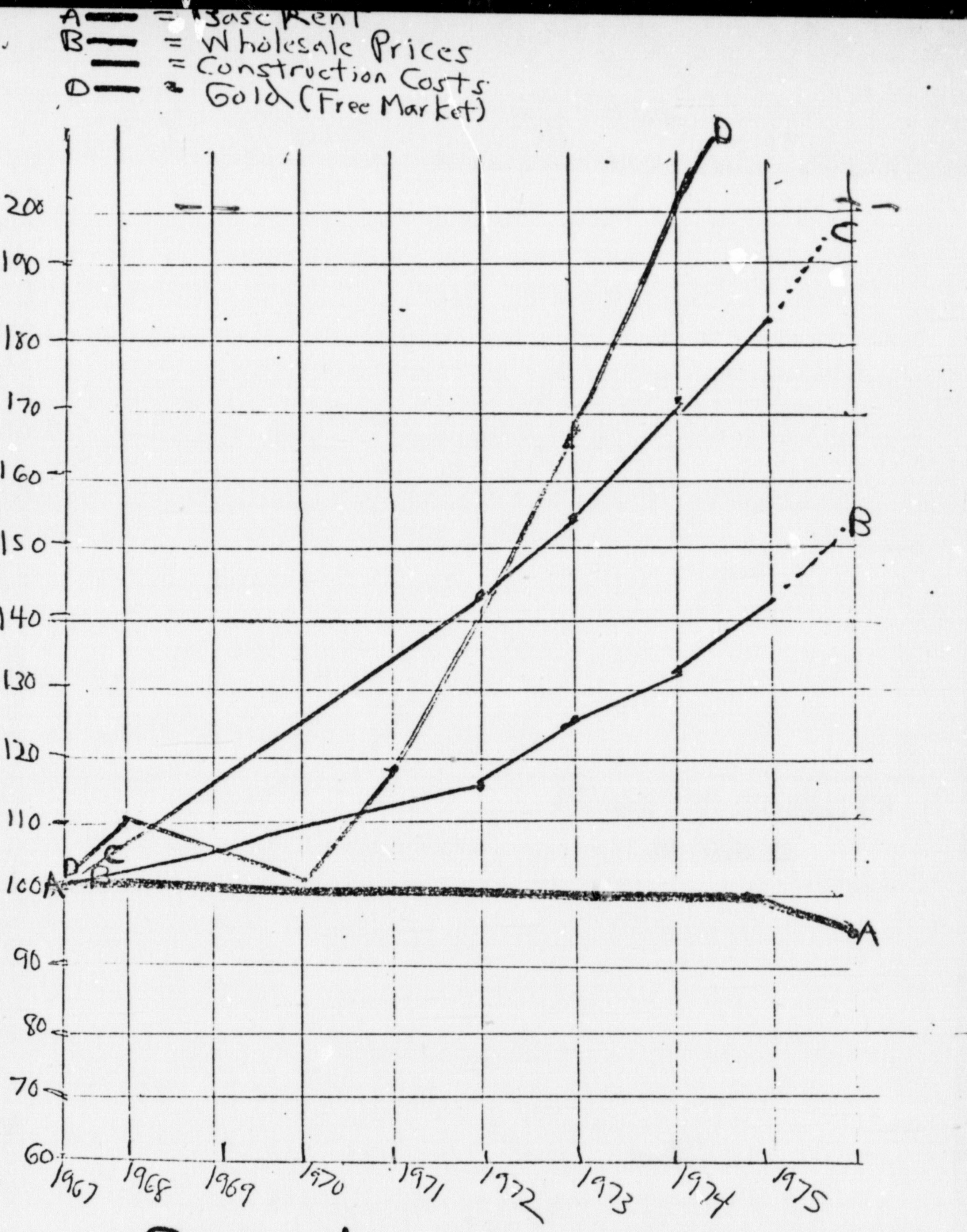
For all of these reasons, the decision below should be reversed and summary judgment granted to appellant, with a remand for assessment of damages and measure of future rentals in accordance with general directions to be given by this Court.

BRADLEY B. DAVIS
Attorney for Appellant



RENT IN RELATION TO CURRENCY

EXHIBIT A



RENT & INFLATION 1967-Date
(CONSUMER PRICE INDEX)

EXHIBIT B

C 321—Affidavit or Affirmation of Service by Mail. C

SECOND CIRCUIT COURT

Index No.

BRUBRAD COMPANY

Plaintiff

against

UNITED STATES POSTAL SERVICE

Defendant

PROOF OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

The undersigned, attorney at law of the State of New York ~~affirms~~: being duly sworn, deposes and says: that deponent is attorney(s) of record for appellant

Deponent is not a party to the action, is over 18 years of age and resides at 1235 Park Avenue, New York, N.Y.

That on the 26 day of December 1975 deponent served the annexed appellant's brief

on David Trager, United States Attorney

attorney(s) for appellee

in this action at 225 Cadman Plaza East, Brooklyn, N.Y.

the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in — a post office — official depository under the exclusive care and custody of the United States post office department within the State of New York.

~~(The undersigned attorney affirms the foregoing statement to be true under the penalties of perjury.)~~

Sworn to before me ~~(Dated)~~

this 26 day of December 1975

Claire L. Sloane

CLAIRE L. SLOANE
Notary Public, State of New York
No. 31-9043625
Qualified in New York County
Commission Expires March 30, 1976

Bradley B. Davis

The name signed must be printed beneath

BRADLEY B. DAVIS